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CURRENT TOPICS.

We have no hesitation whatever in saying that we consider that the best interests of the country, the cause of civilization and the majesty of the law, all demand, imperatively, that Guiteau should have a perfectly fair trial and as able systematic and thorough a defense, as the circumstances of the case will permit. It may seem strange to any reflecting, judicial mind, that we should consider it necessary to give expression to an opinion of such obvious propriety. We are led to do so, however, by what seems to be the universal tone of the lay press in every part of the country, which seems to consider that public interests are to be best advanced by hustling the miserable assassin out of existence with as little delay as may be. The cry *a la lanterne*, which is never very respectable, is less so than ever at a time like the present, when there is no great public danger to justify it. We confess that we think that the good of the individual ought to be absolutely subordinate to the good of society, and that it is not the interest of the person who happens to be accused of murder which should give us grave concern, but the maintenance of the principle of public policy that no man shall suffer death for crime, save in strict accordance with the requirements of the law. If it is objected that the enforcement of this principle operates practically to facilitate the escape of many guilty persons who deserve death under the law, such objection amounts simply to an arraignment of the law itself and the method of administering justice, and should lead to a demand for their amendment. The failure of the law to accomplish what all men see is substantial justice, is without question most frequently the means of effecting important legal reformations. We consider that it is the only fortunate circumstance connected with this whole miserable business, that the attention of the entire public is about to be directed, in a more forcible manner than ever before, to the whole matter of the defense of insanity in cases of homicide. We think it a misfortune that there should be so much difficulty in procuring able and eminent counsel to defend this man; for we believe that the cause of civilization would receive an incalculable benefit from the careful scrutiny by the public, to which this whole system of defense would be subjected, in such an event. We conclude, therefore, that we earnestly hope, for the sake of abstract justice, for the good name of the country, and in honor of civilization, that this miserable wretch will receive a perfectly fair trial, that there will be on the part of the court and the jury no shadow of yielding to popular clamor. We hope that he will be well defended by good counsel; that he will be convicted, sentenced and executed. But if our institutions and our boasted enlightenment will not vouchsafe, in the midst of the populous capital of our country, to any criminal, no matter how heinous his crime, or how bitter the popular feeling against him, a fair, speedy, impartial trial, before an unprejudiced court and jury, with the aid of able and conscientious counsel, then our civilization is a failure, and may be removed in form, but not in effect, from the period of vigilante committees and moon-light lynching parties. If the law is defective with reference to insanity as a defense in cases of homicide, why, amend it; but let no man, guilty or innocent, suffer through a strained interpretation of the law or facts.

The Supreme Court of California, in the recent case of Fratt v. Whittier (24 Alb. L. J. 314) passed upon the vexed question of what constitutes fixtures as between grantor and grantee. A deed of a hotel conveyed the same with "the appurtenances and improvements thereunto belonging." It reserved to the grantor the right to remove from the upper rooms of the hotel "his furniture, carpets and pictures, but none of the permanent fixtures or appurtenances to said property shall be removed." Under this provision it was held that gas chandeliers affixed to pipes in the hotel, a cooking range and attachments, mosquito transoms and window screens affixed to window frames, etc., were fixtures, which in the absence of reservation in the deed passed to the grantee, and that the grantor was not entitled to remove them from the hotel. The reservation of certain

articles by the agreement of the parties to the deed, fixed upon the remaining chattels in the hotel necessary to its use, the character of appurtenances to it.

ABUSE OF PROCESS — MEASURE OF DAMAGE.

In the Six Carpenters' Case[1] "it was resolved, when entry, authority, or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*." In other words, "where the law has given an authority, it seems reasonable that the law should, in order to secure such persons as are the objects thereof from abuse of the authority, when it is abused, make everything done void, and leave the abuser in the same situation as if he had done everything without authority. And this agrees with the maxim *actus legis nemini facit injuriam*.[2]

This rule of the common law applies to all subordinate executive officers, and serves to confine them within the limits of their legal duties; and it seems to be a just and fair one, when we consider the constitutional protection given to property.[3] All of the provisions made by law for the regulation of the officer's proceedings on civil process, which can be of importance to the defendant, are for his benefit and establish duties in his behalf.[4] In accordance with this principle it has been held that "when a sheriff accepts the office, he contracts that he will faithfully discharge its duties. This plainly embraces every duty required of him by law. It follows that when he omits an act of duty enjoined by virtue of his office, he is guilty of a breach of his contract, and will be held responsible should damages result from such breach."[5] Wherever the duty of the officer is a duty to the individual, a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for the damages.[6] Wrongs to the defendant in the process are usually committed by the service upon him of process issued without authority, or otherwise void, or by abuse of the process in service, or by a disregard of some privilege given him by the law.[7] Where such abuse of process consists in the illegal sale of the defendant's property by means of it, no matter in what the illegality consists, the question arises, what is the true rule for assessing the damages in an action against the officer?

It is now settled that the measure of damages in suits of this class is the actual injury sustained, and this is measured by the value of the property sold by the officer.[8]

In Dorsey v. Manlove[9] the court say: "Our understanding of the law is that the term *compensation*, when applied to cases of this character, has a fixed and definite legal signification, and refers solely to the injury done to the property taken, and not to any collateral or consequential damages resulting to the owner, by reason of the trespass. These can be considered only in cases more or less aggravated, where circumstances are shown which justify a departure from the strict rule of compensation. Where no question of fraud, malice, or oppression intervenes, the law limits the relief to compensation, as that term is legally understood; and in such cases the measure of relief is purely a matter of law."

These and like cases proceed upon the theory that the abuse of the authority given by law, makes the officer a trespasser from the beginning.[10] By abusing the process confided to him, he takes himself outside the limits of his official privileges, stands before the law as an ordinary trespasser, and is lia-

1 8 Coke, 146; 1 Smith's Lead. Ca.* 216.

2 9 Bacon's Abr. Trespass (B.) p. 451; Broom's Leg. Max. *126.

3 Ross v. Philbrick, 39 Me. 29.

4 Cooley on Torts, 395.

5 The State v. Lines, 4 Ind. 351.

6 Amy v. The Supervisors, 11 Wall. 136; Raynsford v. Phelps, 10 Cent. L. J. 464; Clark v. Miller, 47 Barb. 38; Cooley on Torts, 379.

7 Cooley on Torts, 395.

8 2 Sedg. Dam. *507, 508, note, 522, 523; 1 Waterman on Trespass, sec. 625; Carrier v. Esbaugh, 70 Pa. St. 239, and cases cited on p. 242; Outcalt v. Durling, 25 N. J. Law, 443; Campbell v. Woodworth, 26 Barb. 648; Dorsey v. Manlove, 14 Cal. 553, and cases cited on p. 557; Nightingale v. Scannell, 18 Cal. 315; Tracy v. Swartwout, 10 Pet. 79.

9 *Supra*.

10 Cooley on Torts, 395; Herm. on Ex. sec. 417; Jarratt v. Gwathmey, 5 Blackf. 237; Stephens v. Lawson, 7 Id. 275; Burton v. Calway, 20 Ind. 469; Sherman A. Braman, 13 Met. 407; Morse v. Reed, 28 Me. 481; Sawyer v. Wilson, 61 Id. 529; Salkrider v. McDonald, 10 Johns. 253; Kerr v. Sharp, 14 S. & R. 399; Melville v. Brown, 15 Mass. 82; 1 Smith's L. C. *220, 221.

ble as such for the consequences of his wrongful acts.

Where the officer, by abuse of his process, illegally sells or disposes of property owned by the person named in the writ, he can not, in mitigation of the damages, claim that the proceeds were applied by him on a debt or liability of such person.[11]

The reason of this rule is sound. The officer is not the agent of the owner of the property. He is only entitled to take and sell the property, and make application of its proceeds, when he proceeds strictly according to law. Except so far as the law assumes to of sell and apply one's property in the payment his debts or liabilities, it is his exclusive right to exercise his own judgment, act upon his own preferences, and adopt his own modes in that respect. It is not the officer's privilege to extort even what is justly due, by the improper execution of legal process. To hold otherwise, would lead to the most fatal consequences, would allow the illegal proceeding to stand good, and encourage the exaction of money by authority not awarded by law. Every one has the absolute right to adjust his own liabilities; and no one has a right to compel the payment of his neighbor's just debts by an illegal intrusion into his affairs. What right has a trespasser, though he be an officer, who seizes and sells the property of another, against his consent, without authority of law, to claim, in mitigation of damages, that he applied the proceeds of the sale to the payment of the owner's debts? To allow such a claim, would encourage a disregard of the wholesome provisions of the law, which forbid an officer to levy upon or to make sale of property, unless the act is done strictly in the manner provided by the statute. It is essential to the rights of property, that the positive regulations of the statute, authorizing the seizure and sale of chattels, without the consent of their owner, should be lawfully and strictly complied with.[12]

So strict are the courts in the application of these principles, that it will not avail the officer to plead that the plaintiff had received a conveyance of the property sold by him in fraud of the rights of the debtor's creditors,[13] or that an offer had been made to restore the property,[14] or that there had been a subsequent legal sale of the property;[15] and this is upon the principle that a wrong-doing official must take the consequences of a violation of the law.[16]

The rule that the officer can not plead an application of the proceeds of his illegal sale to the debt of the owner in mitigation of the damages, is in direct accord with every idea of pure justice, and with the well-established principle that the trespasser or wrong-doer can not set off the consequential benefits of his wrongful acts against the direct injury and damage resulting therefrom.[17]

LOUIS T. MICHENER.

11 Purrington v. Loring, 7 Mass. 388; Smith v. Gates, 21 Pick. 55; Allen v. Hall, 5 Met. 263; Blanchard v. Dow, 32 Me. 557; Ross v. Philbrick, 39 Me. 29; Otis v. Jones, 21 Wend. 394; Bartholomew v. Jackson, 20 Johns. 28; McMichael v. Mason, 13 Pa. St. 214; Wilson v. McElroy, 8 Casey (Pa.) 82; Carrier v. Esbaugh, 70 Pa. St. 239; Dallam v. Fitter, 6 Watts & S. (Pa.) 323; Kerby v. Denby, 1 Mees. & W. 337; Lowell v. Champion, 6 Adol. & E. 407; Hall v. Ray, 40 Vt. 576; 1 Wat. on Trespass, secs. 625, 626, and notes; 2 Sedg. on Dam. *521, 522, 536, 540, and notes; United States v. Keehler, 9 Wall. 83.

12 Carrier v. Esbaugh, 70 Pa. St. 239; Davis v. Campbell, 12 Ind. 192; Gaskill v. Aldrich, 41 Ind. 338; Freem. Ex., secs. 289, 290; Sawyer v. Wilson, 61 Maine, 529.

13 Sawyer v. Wilson, 61 Maine, 529.

14 Haumer v. Wilsey, 17 Wend. 91.

15 Otis v. Jones, 21 Wend. 394; Haumer v. Wilsey, 17 Wend. 91.

16 Clark v. Miller, 47 Barb. 38, 44.

17 Turner v. Rising Sun, etc. Co. 71 Ind. 548.

LIABILITY OF HUSBANDS SEPARATED FROM THEIR WIVES.

II.

Lastly, what is the law as to the husband's liability, where, through his fault, his wife leaves him, or where he has wrongfully turned her away, or has deserted and abandoned her? In such case, if he refuse or neglect to supply her with what is necessary for decency and comfort in his condition of life, she is entitled to procure, on his credit, such articles as a jury would consider necessary for her support and maintenance in a style suitable to his apparent circumstances and the social position he permitted her to assume.[1]

1 Houleston v. Smyth, 3 Bing. 127; Brown v. Ackroyd, 5 E. & B. 819; Harrison v. Grady, 12 Jur. (N. S.) 140; Forristal v. Lawson, 34 L. J. (N. S.) 903; Whitmore v. Gale, Bl. D. & Os. 199; Emery v. Emery,

So, if the husband introduce into his house an improper woman with whom his wife could not reside;[2] or, if he so ill-treated his wife that, through reasonable apprehension of further violence she was obliged to leave.[3] But, it is not necessary that she should have been actually turned out of doors, and it is enough that he has caused her to be in bodily fear of living with him;[4] and so, if she were merely turned out in effect, as by his selling all the furniture, breaking up his establishment, and going himself to live in lodgings.[5] Nor can he relieve himself from liability by notice in the newspapers or to individuals.[6] And it is immaterial that the plaintiff, seeking to hold the husband chargeable, had no knowledge of the husband's circumstances or the wife's necessities, or that the husband was unaware of, and unassenting to, the particular dealings in question. Where the husband was living apart from his wife in adultery, but allowed and paid her a sufficient sum for her maintenance, he was held not liable for her board and lodgings, though the plaintiff had no notice of the allowance.[7] But, if the allowance is inadequate, or is not promptly paid, he will be liable.[8] On the other hand, where the wife, living separate in consequence of her husband's misconduct, is possessed of a separate maintenance of her own, no matter from what source derived, sufficient for her support, the husband will not necessarily be liable.[9] *Aliter*, if she is dependent for her allowance on a person who is not bound to pay it.[10]

In Bazeley v. Forder,[11] the husband was held liable for necessaries supplied for the maintenance of his child, under seven years old, of whom the wife, living separate from him by reason of his adultery, had custody by order of the Court of Chancery, under 2 & 3 Vic., c. 54. It was held that, at common law, a wife could not by her own authority borrow money even for necessaries, so as to charge her husband for money lent.[12] But, in Johnston v. Manning,[13] where defendant's wife was, contrary to her inclination, living apart from her husband, who had refused to receive her back into his house, he was held liable for money lent to his wife, and money paid for her support during the separation, upon proof that the money so lent and paid had been actually expended in the purchase of necessaries for her support; and see Forristal v. Lawson,[14] and Beale v. Arabin,[15] where a husband was held liable for medical expenses incurred by his wife in consequence of his cruelty. And so, a person who has advanced money to a wife, deserted by her husband, for the purpose of, and which has been actually applied towards her support, is entitled in equity to recover the amount;[16] and it seems that it is not necessary that the petitioner should stand upon the rights of any particular person from whom the necessaries were purchased, but may maintain a single suit for the recovery of the whole amount so advanced, even though applied to the purchase of necessaries from various persons.[17]

As the recent decision last cited, which we find fully reported, also, in the present month's number of the *Virginia Law Journal*, was founded on the English authorities, with but one exception, a more detailed summary of it may be of advantage. The suit was instituted by a bill in equity to recover money advanced by the petitioner's wife, from her separate estate (of which her husband, the petitioner, was trustee), to the wife of the respondent, for the purchase of necessaries by her while she had been wilfully de-

1 Y. & J. 501; Hancock v. Merrick, 10 Cush. 41; Mayhew v. Thayer, 8 Gray, 172; Reynolds v. Sweetzer, 15 Id. 78; Hultz v. Gibbs, 66 Pa. St. 360.

2 Curwen v. Maguire, Hay. & Jon. 178; Aldis v. Chapman, 1 Selw. N. P., 9th ed., 276; Houleston v. Smyth, 3 Bing. 127; Horwood v. Heffer, 3 Taunt. 421.

3 Hunt v. Blaquiere, 5 Bing. 550; Montague v. Benedict, 3 B. & C. 635.

4 Baker v. Sampson, 14 C. B. (N. S.) 383.

5 Forristal v. Lawson, 34 L. T. (N. S.) 903.

6 Jenner v. Morris, 3 De G. F. & J. 45; Dixon v. Hurrell, 8 C.& P. 717; Montague v. Benedict, 3 B. & C. 635; Boulton v. Prentice, 2 Str. 1214; Langworthy v. Rockmore, 1 Ld. Raym. 444; Whitmore v. Gale, Bl. D. & Os. 199.

7 Mizen v. Pick, 3 M. & W. 481; Mott v. Comstock, 8 Wend. 544; Kemball v. Keyes, 11 Id. 33.

8 Nurse v. Craig. 5 B. & P. 148; Baker v. Sampson, 14 C. B. (N. S.) 382; Collier v. Brown, 2 F. & F. 67; Hodgkinson v. Fletcher, 4 Camp. 70; Rawlyns v. Vandyke, 3 Esp. 251.

9 Johnston v. Sumner, 3 H. & N. 261; Curwen v. Maguire, Hay. & Jon. 178.

10 Whitmore v. Gale, Bl. D. & Os. 199; Thompson v Harvey, 4 Burr. 2,178; Ewers v. Hutton, 3 Esp. 255; Burrett v. Booty, 8 Taunt. 343.

11 L. R. 3 Q. B. 559.

12 Earle v. Pearle, 1 Salk. 387; Knox v. Bushell, 3 C. B. N. S. 334.

13 12 Ir. C. L. Rep. 148.

14 34 L. T. N. S. 903.

15 36 Id. 249.

16 Deare v Soutten, L. R. 9 Eq. 151.

17 Kenyon v. Farris, 24 Alb. L. J. 31; 46 Conn.

serted by her husband, she being without fault and without means of support. The respondent demurred to the petition, and the demurrer was sustained by the court below; but, on a writ of error taken by the petitioner, this judgment was reversed by the Connecticut Supreme Court of Errors. "In Harris v. Lee,"[18] said Pardee, J., "the petitioner had loaned £30 to the respondent's wife, who had left him for cause, to enable her to pay doctors and for necessaries. The court said: 'Admitting that the wife can not at law borrow money, though for necessaries, so as to bind the husband, yet this money being applied to the use of the wife for her use and for necessaries, the plaintiff that lent this money must in equity stand in the place of the persons who found and provided such necessaries for the wife. And therefore, as such persons could be creditors of the husband, so the plaintiff shall stand in their place and be a creditor also; and let the trustees pay him his money and likewise his costs.' And in Marlow v. Pitfield[19] the court said: 'If one lends money to an infant to pay a debt for necessaries, and in consequence thereof the infant does pay the debt, here, although he may not be liable at law, he must nevertheless be so in equity.' In Deare v. Soutten,[20] the marginal note is as follows: 'A person who has advanced money to a married woman deserted by her husband for the purpose of, and which has been actually applied towards her support, is entitled in equity, though not at law, to recover such sums from the husband.' In giving the decision, Lord Romilly, M.R., said: 'I am of the opinion that this is a proper suit and that the plaintiff is entitled to a decree. The cases cited on behalf of the defendant have no application, and May v. Shey[21] is overruled by Jenner v. Morris.' "[22] He then proceeds to quote from the latter case, and from Walker v. Simpson[23], to the same effect, and concluded as follows: "We willingly follow the leading of these authorities, because we think that the line of separation between necessaries and money loaned for the purpose of purchasing them may well be obliterated. So far as the husband is concerned, they are practically convertible terms. His burden will not be increased if he is made liable for money; the scope of the word necessaries will not thereby be broadened; the lender will be compelled to prove an actual expenditure for them; the law has discharged its duty to the husband in protecting him from liability for anything beyond them; it only discharges its duty to the wife by making it impossible for him to escape liability for these irrespective of the method by which he forces her to obtain them. If he has any preference as to that method, the law will secure it to him; if he refuses to adopt any, he is not to be heard to complain if she is permitted to elect, providing always that she is kept within the small circle of necessity. It is not certain that credit will, under all circumstances, supply necessaries to the wife; at times they may not be had without money, and accidents of time, place or distance may bring about such a state of things as that a friend may be able and willing to place money in her hands upon her husband's credit, who cannot personally attend to its disbursement." The good sense of those remarks is fortified by sound equity, although we know of no technical reason for the equitable doctrine; but, as was observed in Jenner v. Morris, it may be possible that equity considered that the trades-people have for valuable consideration assigned to the party who advanced the money the legal debt which would be due to them from the husband on furnishing the necessaries; and that although a chose in action could not be assigned at law, a court of equity recognized the right of an assignee. And as the Lord Chancellor there said, considering that, to establish the equitable liability of the husband, proof is required that the money has been actually applied to the payment of the debt for which the husband would be liable at law, no hardship or inconvenience can arise from adhering to this doctrine; while, we may add, husbands have a further protection by reason of the principle that, where the parties live apart, the presumption is that the separation was owing to the wife's own misconduct, and, consequently, the plaintiff has the burden imposed on him of showing that it was otherwise

[18] 1 P. Wms. 482.
[19] 1 P. Wms. 559.
[20] L. R. 9 Eq. 151 (1869).
[21] 16 Sim., 588.
[22] 3 De G. F. & J. 45.
[23] 7 Watts & S. 83.

caused. See, in addition to cases already collected, Reed v. Moore.[24]

REMOVAL OF CAUSES—INJUNCTION SUIT—NON-RESIDENT.

BONDURANT v. WATSON.

Supreme Court of the United States, October Term, 1880.

1. An injunction suit to restrain a sheriff from selling the land of a grantee of a mortgagor under a decree of foreclosure of the mortgage, to which foreclosure proceedings the grantee was not made a party, is a proceeding sufficiently independent of the foreclosure proceedings to be removable.

2. The fact of non-residence at the time of the commencement of the injunction suit appearing upon the record, it need not be shown by the petition for removal.

3. Sec. 720, United States Rev. Stat., forbidding the Federal courts to stay proceedings in the State courts, does not affect the right of removal in injunction suits.

Appeal from the Circuit Court of the United States for the District of Louisiana.

Mr. Justice WOODS delivered the opinion of the court:

Daniel Bondurant died seized of a large plantation in the parish of Tensas, in the State of Louisiana. His estate descended to his three sons, Albert, Horace and John, and to Walter Bondurant, his infant grandson.

In 1852, upon petition of the sons for a partition of the plantation, a decree of sale was made, under which it was sold, and struck off to them for the price of $150,000. Of this sum, Walter Bondurant, the grandson, was entitled to one-fourth, namely, $37,500.

The sheriff, on December 4, 1858, executed a deed to the sons, reserving therein a special mortgage and privilege on the lands in favor of Walter Bondurant for his share of the purchase-money.

In the act of sale, which was executed both by the sheriff and the purchasers, the latter bound themselves not to alienate, deteriorate, or incumber the property to the prejudice of the mortgage, an agreement known in the local jurisprudence of Louisiana as the pact *de non alienando*. The mortgage was recorded December 6, 1852. The law of Louisiana required it to be re-inscribed within ten years from that date. It was not re-inscribed until September, 1865. The three sons of Daniel Bondurant divided the plantation between them. The part which is in controversy in this suit was set off to John Bondurant, who, in 1854, conveyed it to one Augustus C. Watson, Sr.

On January 30, 1866, Walter Bondurant began an action against his uncles, Albert, Horace and John Bondurant, in the District Court for the Parish of Tensas, to recover judgment against them for his part of the purchase-price of said plantation, and to enforce his mortgage and privilege thereon. The court rendered a judgment in his favor for the said sum of $37,500, with interest, and ordered, adjudged and decreed that the authentic act of mortgage, which was the basis of the action, should be, and the same was thereby, rendered executory and ordered to be executed, and that the land described therein should be seized and sold to satisfy said judgment.

Upon this judgment a *fieri facias* was issued, directed to the sheriff of the parish. By virtue thereof, he advertised for sale the said plantation described in the mortgage, and struck off and sold it to Walter Bondurant, and executed to him a deed therefor.

Walter Bondurant thereupon brought an action in the United States Circuit Court for the District of Louisiana, against Augustus C. Watson, Sr., to recover possession of that part of the plantation which had been sold to him by John Bondurant.

He recovered judgment for the land against Watson. That judgment was taken, by writ of error, to the Supreme Court of the United States, where it was reversed on the sole ground that there had been no actual seizure of the premises by the sheriff before the sale. See Watson v. Bondurant, 21 Wall. 123.

In the meantime Walter Bondurant died. The judgment in his favor in the District Court for the Parish of Tensas, was revived in the name of his widow, Ella F. Bondurant, his testamentary executrix and the tutrix of his minor child, Walter E. Bondurant.

At her instance another *fieri facias* was issued on the judgment of the District Court for the Parish of Tensas, and placed in the hands of the sheriff of that parish. By virtue of the writ he seized that part of the plantation which had been sold to Augustus C. Watson, Sr., and advertised the same for sale. Thereupon Frank Watson, the appellee, on June 25, 1875, filed his petition in the District Court for the parish of Tensas against the sheriff and Ella F. Bondurant, executrix and tutrix. He averred that his "immediate author," Augustus C. Watson, Sr., acquired the land in question by a good and valid title translative of property from John Bondurant, on November 30, 1854; that said Augustus C. Watson, Sr., held said lands by notorious public and uninterrupted possession, in good faith as owner, from November 30, 1854, until August 5, 1872, when he transferred his title and possession, by deed of that date, to the petitioner Frank Watson, and his brother, A. C. Watson, Jr., and that by deed dated February 6, 1875, A. C. Watson, Jr., conveyed all his estate in said land to the petitioner, Frank Watson.

He further averred that the sheriff of Tensas Parish, acting under a writ of alias *fi. fa.* issued on the said judgment recovered by Walter Bondurant against Albert, John and Horace Bondu-

[24] 5 C. & P. 200.

rant, in the district court of said parish, had illegally seized the tract of land which was held and claimed by the petitioner under the deeds of conveyance already mentioned, and would advertise and sell the same unless restrained by injunction.

The petition further alleged that said act of December 4, 1854, which reserved the mortgage and privilege on said plantation in favor of Walter Bondurant for $37,500, had not been re-inscribed within ten years from the date of its original registry in the mortgage records, and it had, therefore, ceased to have any force or effect as a mortgage and privilege on said tract of land; that, at the time of the institution of the suit of Walter Bondurant and others, in which the judgment was recovered by virtue of which *fieri facias* was issued, said Augustus C. Watson, Sr., was and for many years previous had been in public possession of said property as owner, yet he was not made a party to said suit, which was *via ordinaria*, nor were any demands or notices given him as third possessor.

The petition, therefore, claimed that the seizure of the property by the sheriff was illegal, and prayed an injunction against Ella F. Bondurant, executrix and tutrix, and against the sheriff, restraining them from proceeding any further with the said writ of *fieri facias*, so far as it related to the lands claimed by the petitioner.

The injunction prayed for was granted by the court in which the petition was filed, after notice to the sheriff and Mrs. Bondurant.

Thereupon, on October 18, 1875, Mrs. Bondurant filed her petition, verified by her oath, in which she prayed for a removal of the cause to the United States Circuit Court for the District of Louisiana. In her petition she averred that she was a citizen of the State of Mississippi, and was, in her capacity as tutrix and executrix, defendant in a civil suit pending in that court, in which the matter in dispute exceeded, exclusive of costs, the sum of $500, and in which Frank Watson, who was a citizen of Louisiana, was plaintiff.

This petition was accompanied by a bond in the penal sum of $250, conditioned according to law, and executed by the petitioner and two sureties.

The petition for removal was denied by the State court. Nevertheless Mrs. Bondurant, within the time required by law, filed in the United States Circuit Court a transcript of the proceedings of the State court, beginning with the issuing of the *fieri facias*, which the petition of Watson was filed to enjoin.

The circuit court took jurisdiction of the case and directed it to be placed on the equity side of the docket. Thereupon Mrs. Bondurant filed her answer and amended answer, to which the petitioner, Watson, filed his replication. Upon the issue thus made, voluminous proofs were taken, and upon final hearing the circuit court made perpetual the injunction which had been granted by the State Court. That decree is now here on appeal taken by the defendant, Mrs. Bondurant.

The District Court for the Parish of Tensas, claiming that the cause still remained in that court, notwithstanding the attempt of the defendant to remove it to the United States Circuit Court, proceeded with the cause to final hearing, and also made perpetual the injunction which it had granted. This decree was affirmed on appeal by the Supreme Court of Louisiana. See Watson v. Bondurant, 30 La. Ann. 1.

The defendant brought up that decree also by writ of error to this court.

By agreement of counsel, the records in both cases have been submitted and argued together. Watson, the complainant in both cases, claimed that the suit was not a removable one, and that there was no effectual removal thereof to the circuit court, and that the State courts alone had jurisdiction. The defendant denied the jurisdiction of the State court, and insisted that the case was a removable one, and had been removed to the circuit court, which thereafter alone had jurisdiction. The case brought here from the State Supreme Court having been dismissed for want of a writ of error (see Watson v. Bondurant, p. —), it becomes necessary to decide the question of jurisdiction.

On this question the first contention of Watson, the complainant, is that the petition of Mrs. Bondurant for the removal of the case, which was filed October 18, 1875, does not aver that at the commencement of the suit, which was June 25, 1875, she was a citizen of the State of Mississippi.

Whether, under the act of March 3, 1875, to regulate the removal of causes from the State courts, such an averment is necessary, is a question which was expressly reserved by this court in the case of Insurance Co. v. Pechner, 95 U. S. 183, and which it has never decided. We do not find it necessary to decide it now, for the evidence in the record satisfies us that Mrs. Bondurant was a citizen of Mississippi on June 25, 1875, when the proceeding against her was begun by Watson. Whether his petition avers the fact or not is immaterial, provided the fact is shown to exist by any part of the record. Gold-Washing and Water Company v. Keyes, 96 U. S. 199; Briggs v. Sperry, 95 U. S. 401; Robertson v. Cease, 97 U. S. 646.

The record shows that her husband, of whose will she was the executrix, was, at the time of his death, and for many years before had been, a citizen of the State of Mississippi, residing at Natchez. She was, therefore, a citizen of Mississippi at the time of her husband's death, which took place before the filing by Watson of the petition in this case, on June 25, 1875. In October, 1875, she swears that she was then a citizen of Mississippi. At and before that time she had been sojourning with her father in New Orleans; but, as the record indicates, her residence there was transient and temporary, and with a purpose, declared at the time, of retaining her citizenship in Mississippi. She could not lose her citizenship

in Mississippi without a change of residence *animo manendi*, and her purpose was better known to herself than to any one else.

The fact that she took out letters-testamentary on the will of her husband in the parish of Tensas without giving bond, as she would have been required to do had she been a non-resident of the State, does not, in our judgment, overcome the affidavit of Mrs. Bondurant that she was a citizen of Mississippi; and the presumption that, having once been a citizen of that State, her citizenship continued. The proceedings in the probate court of Tensas parish were conducted entirely by her attorney, and their details were not necessarily known to her.

We think the fact of her citizenship in Mississippi, at the time of the commencement of Watson's suit against her, sufficiently appears by the record, and this supplies the want of an averment of the fact in his petition for the removal of the case.

The next claim of Watson is, that the suit removed was merely auxiliary and incidental to the original case of Walter Bondurant v. Albert Bondurant and others, and was not, therefore, removable.

In this view we do not concur. The case which was removed had all the elements of a suit in equity. The petition filed in the State court sought equitable relief, which no court, strictly a court of law, could grant. Citations were issued and served upon the defendants. When the case was transferred to the circuit court, it was placed on the equity side of the docket. An answer and replication were filed, testimony taken, and a decree made upon final hearing according to the equity practice. The controversy in the original cause between Walter Bondurant and Albert Bondurant and others, had been ended by a final judgment. The case between Watson and Mrs. Bondurant had its origin in that judgment, but it was a new and independent suit between other parties and upon new issues.

It was a suit in which the plaintiff sought to be protected against a judgment, to which he was not a party, by which his property had been specifically condemned to be sold to satisfy a claim against others, and not against him.

He insisted that the mortgage on which the judgment was founded was not a lien on the property claimed by him. To prevent being turned out of possession of his own land, and a cloud being cast on his title by a seizure and sale under the judgment of the State court, was the purpose of his suit. It could not be called incidental or auxiliary to the original case. It was a new and independent controversy between other parties.

It filled all the requisites of the law for the removal of causes. It was a suit of a civil nature in equity, in which the matter in dispute, exclusive of costs, exceeded the sum or value of five hundred dollars, and in which there was a controversy between citizens of different States.

No reason is perceived why a party to such a controversy should not enjoy his constitutional right of having his case tried by a court of the United States.

The case of Bank v. Turnbull & Co., 16 Wall. 190, relied on by the appellee, is not in point. That was a statutory proceeding to try in a summary way the title to personal property seized in execution. It was nothing more than a method prescribed by the law to enable the court to direct and control its own process; and, as decided by this court, was merely auxiliary to, and a graft upon, the original action.

It is next claimed that the case was not removable because its purpose was to obtain the writ of injunction to stay proceedings in a State court, which a court of the United States is forbidden to grant by section 720 of the Revised Statutes.

It is to be observed that the injunction had already been granted by the State court before the application for removal was made. The interest and purpose of Mrs. Bondurant, who asked for the removal, was to get the injunction dissolved. If Watson had filed his petition for injunction in the State court, and, before it was allowed, had petitioned for a removal of the cause to the circuit court, with the design of applying to that court for his injunction, the objection to the right of removal would have force. That would have been an evasion of the statute. But that is not this case.

The act of March 3, 1875, provides that all injunctions had in the suit before its removal, shall remain in full force and effect until dissolved or modified by the court to which the suit shall be removed. It provides for removals, without making any exception, of cases in which an injunction has already been allowed to stay proceedings in a State court. It would not be according to the well-settled rules of statutory construction to import an exception in to this statute from a prior one on a different subject.

We are of opinion, therefore, that the case was one removable under the act of March 3, 1875, and that the circuit court obtained jurisdiction by the proceedings for its removal.

The merits of the case have been conclusively settled by the Supreme Court of Louisiana.

Watson, the plaintiff, claimed that the parcel of land conveyed to him by John Bondurant was freed from the lien of the mortgage to Walter Bondurant, by the failure of the latter to have it re-inscribed within the ten years from the date of its original registry.

The contention of the defendant, Mrs. Bondurant, is that re-inscription was not necessary to preserve the lien of the mortgage on Watson's land, because he was charged with notice by the pact *de non alienando* contained in the mortgage, and because the mortgagee, Walter Bondurant, being a minor, the mortgage to him did not require re-inscription to preserve its lien.

These questions have been settled against the appellant by the Supreme Court of Louisiana.

That court has decided that, under the positive

law of Louisiana, as contained in the code and statutes, nothing supplies the place of registry, or dispenses with it, so far as those are concerned who are not parties to the mortgage, and that when ten years have elapsed from the date of inscription, without re-inscription, the mortgage is without effect as to all persons whomsoever are not parties to the mortgage. Adams & Co. v. Daunis, 29 La. An. 315, and cases there cited.

In the case of Watson v. Bondurant, 30 La. An. 1, the same court held that no mortgage has any effect as to third persons unless recorded; and, save in the single case of a minor's mortgage on the property of his tutor, every mortgage ceases to have effect, except as to the parties to it, unless re-inscribed within ten years from the date of its original inscription, and that neither the existence of the pact *de non alienando* in a mortgage, nor the pendency of a suit to foreclose the same, obviates the necessity of its inscription or re-inscription.

Whether a mortgage binds the heir of a mortgagor without inscription or re-inscription, it is not necessary to decide in this case, and we do not decide it.

The decisions above cited, establishing, as they do, a rule of real property in the State of Louisiana, are binding on this court, and are conclusive of this case. Suydam v. Williamson, 24 How. 427; Jackson v. Chew, 12 Wheat. 162; Beauregard v. New Orleans, 18 How. 497.

The decree of the circuit court must, therefore, be affirmed: and it is so ordered.

CONTRACT — MUTUAL STIPULATIONS — MUTUAL DEFAULT.

BROWN v. SLEE.

Supreme Court of the United States, October Term, 1880.

The failure of both parties to a contract, in the performance of mutual stipulations, will constitute a waiver on the part of each of the default of the other, and either may tender the performance of his stipulation within reasonable time, and enforce the performance of the contract against the other.

Appeal from the Circuit Court of the United States for the District of Iowa.

Mr. Chief Justice WAITE delivered the opinion of the court:

This is a suit in equity and presents the following facts: Prior to August 6, 1870, Talmadge E. Brown and Jarvis Langdon were partners in business. On that day Langdon died, leaving a will, in which he appointed John D. F. Slee, Charles J. Langdon, Theodore W. Crane, Olivia L. Langdon, and Samuel L. Clemens executors. On the 25th of April, 1871, the executors and Brown entered into the following agreement in writing:

"The executors of Jarvis Langdon, deceased, for value received, hereby sell, assign, set over and transfer unto Talmadge E. Brown, all the right, title and interest of J. Langdon, deceased, in or to the undivided property or assets of the late firm of T. E. Brown & Co., of Memphis, Tennessee. Subject, however, to all taxes and assessments thereon, now made or hereafter to be made, to all indebtedness therefor, and to all liabilities of said firm or any of the members thereof, for transactions in the business of the firm in tort and contract, and subject to all judgments against the said firm or any member thereof, recovered or to be recovered, and all costs, disbursements, officers and counsel fees, and all liability for contribution to any other partner or person in consideration of moneys paid or to be paid upon any liability of, from and against all of which real or possible liabilities, and of, from and against any other liability growing out of the transactions of said firm, said Brown agrees to fully indemnify and save harmless the executors, heirs and next of kin of said J. Langdon, deceased. And said Brown further agrees to pay and discharge any just and legal claim of any person or persons whomsoever, for any share of the profits or proceeds of the business of said firm, whether said claim be against the said firm or against the said Langdon deceased, individually, and to fully indemnify and save harmless the executors, heirs and next of kin of said Langdon of, from and against any such claim; all the aforesaid agreements of indemnity to apply not only to the liability growing out of the transactions of said firm, but also to any possible liability growing out of the transactions of the predecessors of said firm."

"Said Brown agrees to pay for such interest as follows: First. Upon the assignment of the interest above mentioned twenty-five thousand dollars ($25,000) in cash, together with the further amount of fifty thousand dollars ($50,000) in notes, satisfactorily endorsed by B. F. Allen or other satisfactory endorsers, and running from three (3) to eighteen (18) months, at a fair average time from these extreme points of time mentioned. Second. A certain tract of land consisting of one hundred and thirty (130) acres, situated within the limits of the corporation of the City of Des Moines, Iowa, and also a certain plantation situated on the White River, in Arkansas, consisting of sixteen hundred (1600) acres of land, and all the buildings, improvements and appurtenances belonging thereto. In reference to the lands in Iowa and Arkansas, the purchaser hereby agrees that in five years from the date of this contract, he will, if the estate or its legal assigns so desire, purchase back the lands for twenty-five thousand ($25,000) dollars, paying that sum in cash. This agreement is upon condition that the aforesaid two tracts of land are owned by said Brown in fee simple, absolute, free and clear of all taxes, assessments and incumbrances of whatever nature, and that they shall, before this assignment shall be operative, be conveyed by full

covenant deeds to the executors of said J. Langdon, deceased, said conveyances to be executed also by the wife of said Brown, and said executors to be furnished with properly authenticated abstracts of title thereof, showing the title thereof to be perfect and that they are free and clear of all incumbrances. The executors further agree that upon the final performance of this contract they will surrender certain notes now held by the estate against T. E. Brown, amounting to the sum of seventeen thousand dollars ($17,000), the aforesaid interest shall be assigned upon the execution of said contract and the delivery of notes, money, and deeds of the land as afore-mentioned. Said Brown is to have sixty (60) days within which to make the delivery and payments described in this contract. Dated 25th April, 1871. The estate of J. Langdon, per

J. D. F. SLEE, Executor and Attorney.

T. F. BROWN."

On the 25th of June, 1871, Brown paid the cash called for by the contract, gave his notes, and conveyed the Des Moines land to Charles J. Langdon. Thereupon the executors made to him the following assignment:

"IN consideration of $100,000 this day received of T. E. Brown, as by the terms of our contract made with him, bearing date April 25, 1871, we, the executors of the last will of Jarvis Langdon, deceased, do hereby sell, assign and transfer to said T. E. Brown, all our rights and all the right, title and interest Jarvis Langdon had in his lifetime in and to the property and assets of the firm of T. E. Brown & Co., at Memphis, Tennessee, subject to the terms and conditions of our said contract of April 25, 1871, above mentioned.

J. D. F. SLEE, Executor.
C. J. LANGDON, Executor.
T. W. CRANE, Executor.
SAMUEL L. CLEMENS, Executor.
OLIVIA L. LANGDON, Executrix."

On the 3d of July, Brown took from Charles J. Langdon a lease of the Des Moines land for five years, and, for the use, agreed to pay the taxes and keep the premises in repair. Langdon, however, retained the right to sell the property, or any part of it, in which case the lease was to terminate, so far as it related to the property sold.

On the 30th of August the following supplemental agreement was entered into by the parties:

"It is hereby mutually agreed by and between Talmadge E. Brown and J. D. F. Slee and others, executors of the estate of Jarvis Langdon, deceased, that said Brown need not perfect his conveyance to the plantation on White River, in Arkansas, as he is required to do by contract with said executors, dated April 25, 1871, but may, in lieu thereof, transfer and assign to said executors a certain judgment now owned by him against the County of Buena Vista, State of Iowa, on which there is due to him five thousand ($5,000) dollars, for the purposes named in said contract of April 25, 1871, said Brown to guarantee the collection of said judgment. It is further understood and agreed that if said executors desire it, said Brown shall, at the expiration of the five (5) years stated in said contract of April 25, 1871, repurchase the 130 acres of land in the City of Des Moines at $25,000, the same as though the plantation aforesaid was included therein. And it is further understood that if any of said Buena Vista judgment shall within said five (5) years be paid to said executors, they will allow interest thereon at the rate of seven (7) per cent. per annum, and the principal so paid may be deducted from the $25,000 to be paid by said Brown for the repurchase of the Des Moines property. In witness whereof, said parties have hereunto set their hands this 30th day of August, 1871.

J. D. F. SLEE, Executor,
And attorney for the executors of the estate of J. Langdon, deceased.

TALMADGE E. BROWN."

On the 30th of October, 1875, Charles J. Langdon wrote the following letter to Brown, which reached him in due course of mail:

"ELMIRA, *Oct.* 30, 1875.

"T. E. BROWN, ESQ., *Des Moines, Iowa.*

"DEAR SIR: My wife's health is so poor that I am obliged to go away with her, and I shall sail for Europe Saturday next, for an absence of four, six or eight months. I have left all necessary papers for the closing of our matters, the re-deeding of the Des Moines land and all other necessary business, with Mr. Slee. The balance of $25,000, less what has been paid on Buena Vista County judgment, will be due April 25, 1876, and we shall desire the money at that time, as per contract.

Yours truly, C. J. LANGDON, Executor.

To this letter Brown made no reply until May 26, 1876, when he wrote as follows:

"DES MOINES, 26*th May*, 1876.

"CHAS. J. LANGDON, ESQ., *Elmira. N. Y.*

"Dear Sir: Your letter to me last fall in regard to the land did not seem to require an early answer, and I have delayed it until now. I shall not be able to pay you this year, and propose the following, which I trust will answer your purpose: 25th April, '77, $5,000.00 and a like sum on the 25th day of each April following, all unpaid sums to draw six per cent. per annum from April 25, '76, the land to remain in your name until it is paid. The last payment will be fractional part of $5,000, of course. This is small interest, but interest must in future be less than it has been, and this is all I get on money that has been due longer than this has to you. There has been nothing paid on the Buena Vista judgment since remittance to you. The county are trying to have the same set aside for some informality or fraud, and may succeed, but I think not.

"Very truly yours, etc., T. E. BROWN."

On the 31st of May, Langdon answered this letter declining the proposition, and on the 4th June, Brown wrote him as follows:

"DES MOINES, 4 *June*, '76,

"C. J. LANGDON, ESQ., *Elmira, N. Y,*

"Dear Sir: I am in receipt of your favor of the

31st May. You say the proposition does not suit you. This does not surprise me. I did not think it would. I am very sorry I cannot pay this money and take the land now. You must take such course in the matter as seems to your interest. I do not ask or expect you to be governed by what may seem to be mine.

"Yours, etc. T. E. BROWN."

On the 26th of June, 1876, the executors caused to be tendered to Brown a deed for the Des Moines land and demanded the payment of $23,381.14, and again on the 17th of July they tendered the deed accompanied with an assignment of the Buena Vista County judgment. The money not being paid, this suit was begun on the 19th of July to obtain a sale of the property to pay the balance that was due of the agreed sum of $25,000, and if the proceeds were not sufficient to pay the whole debt, to obtain execution for what remained unsatisfied.

Among the assets of the firm was a debt against one John S. Baldwin. This debt was originally contracted to Langdon, but afterwards, at the request of Langdon, the amount was transferred to the firm, Baldwin being charged and Langdon credited with it on the books. Baldwin became insolvent, and part of his debt has never been paid. By way of defense to the original bill by the executors, Brown filed a cross-bill, in which he alleged in substance that when this account against Baldwin was transferred to the firm, Langdon individually guaranteed its payment in writing, and that in consequence he was permitted while in life to draw large sums from the partnership. It was then averred "that the guaranty of the said Langdon was always recognized and treated by him (Langdon) as an individual guaranty, made upon his own personal account, and not as any part of the firm's business, or as necessarily or properly connected therewith. That at the time of the purchase of the interest of said Langdon's estate from his executors as hereinbefore stated, it was believed, or, at all events, there was a hope and a probability that something, at least, upon the balance due from said Baldwin's account, and possibly all might be collected, or in some manner realized from said Baldwin. And that said claim against said Baldwin was spoken of, and was the subject of conversation between the parties at the time of the purchase, and the same was not settled or adjusted or understood to be embraced in the terms of the settlement for the reason among others, of the hope that the same might be realized in whole or in part from the said Baldwin. "And your orator, therefore, distinctly avers, as a substantive and existing fact, that the claim upon Langdon's executors, by reason of that guaranty, was not embraced in said settlement, nor intended to be embraced, but was omitted therefrom for adjustment between the parties in case the said Baldwin should fail to pay any portion of said balance against him."

The contract between Brown and the executors on which the original suit was brought, was made an exhibit to the cross-bill, and the prayer was that the estate of Langdon might be charged with what was due on the debt. The executors demurred to the cross-bill, and on the final hearing in the circuit court this demurrer was sustained and a decree rendered on the foregoing facts, finding due from Brown $26 320.37 for the re-purchase, and ordering the sale of the property to pay the debt. From that decree Brown appealed.

There are two principal questions in this case, to wit: 1, whether on the facts, Brown is bound to purchase back the Des Moines property and pay the balance of the $25,000 which remains after deducting the collections on the Buena Vista County judgment; and, 2, whether the demurrer to the cross-bill was properly sustained.

To our minds the fair construction of the contracts on which the case depends is, that Brown purchased the interest of the estate of Langdon in the partnership property for one hundred thousand dollars, payable twenty-five thousand in cash, fifty thousand in notes, and twenty-five thousand in the Des Moines land and Buena Vista County judgment, unless the executors concluded not to keep the land and the judgment, in which event he was at the end of five years to purchase them back and pay in money the twenty-five thousand dollars for which they were taken, the executors crediting him with what had in the meantime been collected on the judgment, with interest at the rate of seven per centum per annum.

This is not only the fair inference from the language of the contracts themselves, but it seems to have been the understanding of the parties as shown by their conduct at the time and since. Thus, on the 25th of June, although Brown did not then convey the Arkansas lands, the executors made their transfer of the partnership property "in consideration of one hundred thousand dollars" that day received. And when the Buena Vista County judgment was taken in lieu of the Arkansas lands, it was stipulated that all collections made within the five years should be credited with interest on the twenty-five thousand dollars, if the executors desired the repurchase to be made. So when Langdon wrote Brown on the 30th of October, 1875, he said, "the balance of twenty-five thousand dollars, less what has been paid on the Buena Vista County judgment, will be due April 25, 1876, and we shall desire the money at that time as per contract." He thus treated what was to be paid as a debt which the executors desired to have met at maturity. Brown evidently looked on the transaction in the same way, for in his letter written a month after the time for repurchase had expired, he made no objection to the failure to tender a reconveyance on the day, and demand the payment of the money, but said: "I shall not be able to pay you the money this year, and propose the following, which I trust will answer your purpose."

Under these circumstances, all that was necessary to put on Brown the obligation to take back the land and pay the money instead, was for the executors to signify to him, in some appropriate way, that they had concluded not to keep it in satisfaction of the sum for which it was to be taken. This need not necessarily be done on the day the purchase was, under the contract, to be made. It was enough if at any time before the expiration of the five years, the conclusion was finally reached and Brown properly notified. The reasonable presumption is, that the parties expected the election would be made before the end of the time, because as the money was to be paid on the day, some preparation would ordinarily be required to meet so large a demand. Time was material in the sense that the election must be made within the five years. If that was not done, the obligation of Brown to take back the property was gone. He was not bound to repurchase, unless the desire that he should do so was expressed in proper form before the time elapsed.

We proceed now to consider whether the executors did in fact make their election in proper form and within the time. This depends entirely on the letter of Langdon under the date of the 30th of October, 1875, and the reply of Brown of the 26th of May following. No particular form of election was provided for in the contracts. All they required was that the proper representatives of the estate should, within the time, express to Brown their desire that he "purchase back" the lands under the contract. The letter of October 30 was written by Charles J. Langdon in his own name as executor, but he held the title of the property evidently with the assent of his co-executors. He wrote that he had left all the necessary papers with Mr. Slee, another of the executors, and concluded by saying that "we shall desire the money at that time as per contract." In what he did he was evidently acting for the estate; and as his acts have been adopted by all the executors as the basis of this suit, it is clear that his letter was at the time the expression of their will, and bound them so far as necessary to enable Brown to get the title from him, if the money was paid as the contract required.

This lettter did not in so many words say to Brown that the executors desired him to repurchase under the contract; but it did tell him they desired the money, which the contract called for only in the event of his repurchase. This could not be understood otherwise than as an expression of a desire that he purchase back the property under the contract. And evidently it carried that idea to Brown, for he immediately began to treat for terms, not because he claimed not to be bound, but because, to use his own words, he was "not able to pay." His conduct corresponded in all respects with that of the executors, and his letter is not to be treated as a waiver of the neglect of the executors to make their election at the day, but as a recognition of the fact that a proper election had been made and accepted.

It is claimed on the part of the appellants, however, that to enable the executors to recover, they must prove "both an election to sell and the delivery or tender of a deed on the day fixed for performance." As we have already shown, it needed no tender of a deed on the day to require Brown to repurchase. It was enough if, before the expiration of the time, the executors made their election that he should do so, and signified it to him in proper form. That being done, the rights of the parties respectively under the contract were fixed. Brown became bound to repurchase and pay the money, and the executors to receive the money and reconvey. Either party could then require the other to perform, and neither could insist on the default of the other, so long as he was himself behind in his own performance. Brown could not demand a deed until he tendered the money, and the executors could not require the money until they had offered a deed. Neither party offered to perform on the day, and, therefore, one was as much in default as the other. Such being the case, either party, after relieving himself from his own default by performance, or an offer to perform, could require the other to perform within a reasonable time. Neither could insist that the other had lost his rights under the contract until he had himself done what he was bound to do. The failure of both parties to perform on the day was equivalent to a waiver by each of the default of the other. The executors did offer to perform within a reasonable time after the day, and we think are entitled to recover.

As to the cross-bill. Upon this part of the case it must be assumed, as a fact admitted of record, that when Langdon, the deceased partner, transferred his debt against Baldwin to the firm and got credit for it, he guaranteed in proper and legal form its ultimate collection, and that it was taken on the faith of this obligation on his part. The only question, therefore, is whether, under the contract between Brown and the executors, that obligation was assumed by Brown, or, in effect, discharged. Brown took the assignment of the estate's interest in the firm property, subject, among other things, to all possible liabilities of Langdon for the transactions of the firm, and he agreed to indemnify the estate against all liability growing out of such transactions. The acceptance of the transfer of the Baldwin debt was a firm transaction, and the guaranty of Langdon grew out of that transaction. If the debt should not in the end be paid, the balance might be charged back to Langdon when the affairs of the partnership were closed up, and his interest in the good assets would be diminished to the extent of such a charge. The firm, as a firm, could not sue him on his guaranty. All that could be done would be to take his liability into account when settlements and divisions were made between the partners. This liability occupied a position in no material respect different, so far as winding up the affairs of the partnership were concerned, from an ordinary overdraft in the progress of the

business. It was a liability to which Langdon was bound to respond at the proper time. If, instead of buying out the interest of the estate, Brown had wound up the affairs of the partnership and divided the proceeds, the balance due from Baldwin might have been set off to the estate as so much cash, but he could not have sued the estate directly on the guaranty, The liability was one that could only be enforced as an incident to the settlement of the business, and a statement of the accounts between the partners. The contract between Brown and the executors made such a settlement and such a statement of accounts unnecessary. Brown took the place of the estate of the partnership, assumed all its liabilities to or for the firm, and agreed to pay one hundred thousand dollars to the estate for what would be distributable to it from the assets on a full and final adjustment of the accounts of the individual partners, and the reduction of all the assets to money. That was the evident purpose of the parties as expressed by the contract they made. The averments of Brown as to the obligations of the estate are contradicted by the terms of the written instrument to which he refers, and on which the rights of the parties depend. There is no allegation of fraud or mistake in reducing the contract to writing. It follows that the demurrer to the cross-bill was properly sustained.

The decree of the circuit court is affirmed.

REMOVAL OF CAUSES — ELECTION CONTEST—CIVIL RIGHTS ACT.

DUBUCLET v. STATE OF LOUISIANA.

Supreme Court of the United States, October Term, 1880.

An election contest, in which it is alleged that many voters were prevented from voting by bribery, and in violation of the civil rights act, is not a case "arising under the Constitution or laws of the United States," and is not removable under the act of March 3, 1875.

In error to the Circuit Court of the United States for the District of Louisiana.

Mr. Chief Justice WAITE delivered the opinion of the court:

This is a suit begun in the State court of Louisiana, on the 20th of March, 1877, to try the title of Dubuclet, the plaintiff in error, to the office of treasurer of State, the duties of which he was performing under a commission from the governor, dated December 31, 1874. The allegations of the petition are, in substance, that Moncure was in fact elected to the office at an election, which was held on the 2d of November, 1874, but that the returning board, by a false and illegal canvass and compilation of the votes, declared that a majority were in favor of Dubuclet, who was thereupon commissioned. On the 2d of April, 1877, Dubuclet filed his petition for the removal of the suit to the Circuit Court of the United States for the District of Louisiana. This petition was granted by the State court; but when the case got to the circuit court, it was remanded, on the ground that it was not in law removable. To reverse that order of the circuit court, this writ of error was brought.

It is conceded that, according to the decisions in Strauder v. W. Virginia, 100 U. S. 303, and Virginia v. Rives, 100 U. S. 313, a case was not made for removal under sec. 641, Rev. Stat. We think it equally clear that the showing in the petition was not sufficient to effect a transfer under the act of March 3, 1875, 18 Stat. 470, chap. 137, sec. 2. The averments relied on for this purpose are as follows: "Petitioner further represents that, at the election held in this State on the —— day of November, A. D. 1874, for State treasurer, at which petitioner was a candidate, that in the parishes of De Soto, Bienville, Union, Grant, and other parishes of the State, there were more than five thousand citizens of color of the State of Louisiana and of the United States qualified by law to vote at said election, and who offered to vote, and if they had been permitted to vote would have voted for petitioner, and against John C. Moncure, relator, and who were prevented, hindered and controlled and intimidated from voting for petitioner by relator Moncure and those acting in his interest, by means of bribery, threats of depriving them of employment and occupation, and of ejecting them from rented houses, lands and other property, and by threats of refusing to renew leases or contracts for labor, and by threats of violence to them or their families, in violation of their and your petitioner's civil rights, and in violation of the laws of the United States, made and enacted to protect the civil rights of citizens of color and previous condition of servitude. Petitioner further represents that, in consequence of said illegal acts and violations of the laws of the State of Louisiana and the United States, by relator Moncure, and those acting in his interest, at and before said election, and for the purpose of defeating your petitioner for treasurer of the State of Louisiana, that the returning officers of election of the State of Louisiana, in accordance to law, and their sworn duty, duly returned your petitioner duly elected, by rejecting the votes cast in the several parishes and at the several polls where relators, in their petition, complain the vote should have been in his, Moncure's, favor, and where they complain the votes should not have been counted in favor of petitioner. Petitioner further represents that the suit of relators is for the object and purpose of depriving your petitioner of the office of treasurer of the State of Louisiana, by reason of the denial of the aforesaid citizens the right to vote on account of race, color and previous condition of servitude, in violation of the laws of the United States made to protect the equal civil

rights of petitioner and those offering to vote for him, and by reason of the right guaranteed by the fifteenth article of amendment to the Constitution of the United States."

If all that is here alleged be true, it does not show a case "arising under the Constitution or laws of the United States." If Moncure was guilty of what is charged against him, he had violated the provisions of section 5507 of the Revised Statutes; but that gave Dubuclet no right, under the laws of the United States, to have the entire vote of the designated parishes thrown out by the canvassers of the election. Moncure might have been prosecuted for what he had done, but neither his prosecution, conviction or punishment would of itself set aside the vote of the parishes or polls as returned. The effect of such conduct on the validity of the election depended, so far as this record shows, on the laws of the State, and not on those of the United States. Whether Moncure and those in his interest have been guilty of a crime punishable by law, may depend alone on the laws of the United States; but the United States have not as yet attempted to declare what effect such unlawful acts shall have on the election of a purely State officer. The laws of Louisiana, it is conceded, gave colored men the right to vote at all elections; and because in this case they were prevented by intimidation from exercising that privilege, the properly constituted canvassing board of the State, acting, as is alleged by Dubuclet in his petition, "in accordance to law and their sworn duty," rejected all votes from the parishes and polls where intimidation occurred, and thus found that he was elected. Had the votes of these parishes been counted, the result would have been in favor of Moncure. Thus, according to Dubuclet's own showing, his right to his office depends on the laws of the State. Because the laws of the State required the returning board to reject the votes of the parishes and polls where intimidation, whether of white or colored voters, materially interfered with the election, the majority of the votes cast at the election, which could be counted, were in his favor, and, therefore, he is in office. Such is in effect his allegation in the petition for removal. Clearly, then, on his own showing his right arises not so much under the Constitution and laws of the United States, as under those of the State.

Sec. 2,010 Revised Statutes gives one who "is defeated or deprived of his election," to such an office as Dubuclet holds, the right of suing for his office in the courts of the United States, "where it appears that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who offer to vote, on account of race, color, or previous condition of servitude." That certainly is not this case; for Dubuclet, instead of being defeated or deprived of his election, is now in office under his election duly declared pursuant to the laws of the State, and exercising all the duties of his place, and enjoying all its privileges. This section provides for an original suit by one out of office to get in, but not for the removal of a suit against one in office to put him out. It is unnecessary to discuss the validity of the law in its application to purely State offices, for it does not affect this case. It is one thing to have the right to sue in the courts of the United States, and another to transfer to that jurisdiction a suit lawfully begun in a State court.

We think it clear that the circuit court ought not to have taken jurisdiction of the case, and its judgment to that effect is consequently affirmed.

STATUTE OF FRAUDS — ORAL PROMISE TO PAY DEBT OF ANOTHER.

CLAPP v. WEBB.

Supreme Court of Wisconsin.

In order to take an oral promise to pay the debt of another out of the statute of frauds, it is not sufficient that some benefit may result incidentally to the promisor. It must appear that the benefit was the inducing cause of the promise.

Appeal from Circuit Court, St. Croix County.

N. H. and M. E. Clapp, for respondent; *John W. Bashford & L. P. Wetherby* for appellant.

The complaint alleges that between September 1, 1875, and May 1, 1876, one Harrington was engaged in cutting, hauling and banking certain pine saw logs, of which the defendant was the owner. That between the same dates the plaintiff furnished feed for the horses employed in that business, and performed labor and services in and about the cutting, etc., of such logs to the amount and value in all of $300, which sum was found due him therefor on an accounting between him and Harrington had in April, 1876, and that Harrington thereupon gave plaintiff a written order on the defendant for that sum.

The cause of action is thus stated in the complaint: "Thereafter, and before the first day of June, A. D. 1876, this plaintiff presented said order to said defendant and requested said defendant to pay the same, and that said defendant did then promise and agree to and with this plaintiff, that he, the said defendant, would pay this plaintiff the said sum of $300, and that this plaintiff, relying solely upon said promise and agreement of said defendant to pay as aforesaid, allowed the time in which this plaintiff might have filed a petition for a lien on said logs, for said debt to run out and expire."

Judgment is demanded for $300 interest and costs. The defendant answered a general denial.

The testimony introduced on the trial tends to show that a portion of the logs described in the complaint were cut by Harrington by virtue of a permit in writing from one Humbird, who owned the land upon which they were cut, and that the permit was assigned by Harrington to the defendant as collateral security for advances made and

supplies furnished by the latter to Harrington, on account of such logs; and, perhaps, also for a pre-existing debt. That the logs were sold June 15, 1876, and the defendant received the proceeds of the sale; but it does not appear that any of such proceeds remained after paying the indebtedness of Harrington to the defendant.

The testimony also tends to prove the allegations of the complaint in respect to the indebtedness of Harrington to the plaintiff, the accounting and the giving of the order for $300 on the defendant by Harrington.

The testimony of the alleged promise of the defendant to pay Harrington's indebtedness to the plaintiff, was given by Harrington, and is as follows: "Mr. Clapp requested me to see Mr. Webb in regard to the amount of his order, and tell him that if he was hard up for money, he would wait on him till fall if he would give him a note. I met Mr. Webb, and did the errand; and I think the answer he gave me was, 'All right,' or something to that effect. I told Mr. Clapp; he made out a blank note; and I brought it down here for Mr. Webb to sign, and went to him, but did not see him; I went back home and sent it to him by mail, and I never saw it afterwards. This conversation with Mr. Webb was in May; about the time he was finishing the drive. It was up in the backwater here. I sent the note in the letter before the first day of June. I think I carried the note a few days before I was down, and when I went back, I think I sent it right back to him; I am quite sure it was in May. I put the letter in the post-office, addressed to John E. Webb, Hudson." The defendant testified, denying the above conversation, and denying also the receipt of the letter mentioned by Harrington. There is no proof of any interview between plaintiff and defendant, or any negotiations between them, directly or indirectly, in respect to the plaintiff's demand against Harrington, at any time before June 1, 1876, other than is contained in the testimony of Harrington, above quoted.

The charge of the judge to the jury is sufficiently stated in the opinion.

The verdict was for the plaintiff for the amount of his claim; a motion for a new trial was denied, and judgment for the plaintiff was entered, pursuant to the verdict.

The defendant has appealed from the judgment.

LYON, J., delivered the opinion of the court:

Assuming that the defendant promised orally in May, 1876, to pay the indebtedness of Harrington to the plaintiff, and assuming also that the plaintiff could have enforced a lien upon the logs mentioned in the complaint to the amount of such debt, at any time before the first of June following, the question to be determined is, whether such oral promise is void by the statute of frauds.

The learned circuit judge refused to instruct the jury that such promise is void under the statute, and instructed them as follows: "If you find from the evidence that the defendant, in order to protect his interest in the logs and to induce the plaintiff to forbear a prosecution of his claim against the logs, promised to pay his claim; and the plaintiff, relying upon such promise, did so forbear to prosecute, you shall find for the plaintiff."

The statute provides that "every special promise to answer for the debt, default or miscarriage of another person," shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party charged therewith. R. S. 654, sec. 2307 (T. S., 1255, sec. 2).

Under repeated decisions of this court, the alleged promise is within the statute of frauds, unless it was founded "upon a new and independent consideration, passing between the newly contracting parties, and independent of the original contract." Emerick v. Sanders, 1 Wis. 77. In Dyer v. Gibson, 16 Wis. 557, the rule is laid down that "the promise of one person, though in form, to answer for the still subsisting debt of another, if founded upon a new and sufficient consideration moving from the creditor and promisee to the promisor, and beneficial to the latter," is not within the statute; and Dixon, C. J., proceeds to say that "the distinction is between cases where the person promising has for his object a benefit accruing to himself, in which the original debtor has no interest, and from which he derives no advantage, and cases where his primary and leading object is to become surety for the debt of another, without benefit to himself, but for the exclusive advantage of the other parties to the contract." p. 370.

In Young v. French, 35 Wis. 116, the present Chief Justice states the distinction thus: "Where the party promising has for his object some benefit and advantage accruing to himself, and on that consideration makes the promise, distinguishes the case of an original undertaking from one within the statute."

In the present case, we have assumed that at any time before June 1, 1876, the plaintiff might successfully have commenced proceedings and enforced a lien upon the logs for the amount of his claim against Harrington. If he could have done so, it is obvious that it was to the benefit and advantage of the defendant that the plaintiff should not enforce his right to such lien. But the mere fact that an advantage may result incidentally to the promisor, is not alone sufficient to take the agreement out of the statute. The resulting advantage to him must be the object of his promise—the consideration upon which it was made. We are not aware of the existence of any rule of law, which authorizes the inference that merely because the promisor may be incidentally benefited by his promise, his object in making it, and the consideration therefor is such incidental benefit.

Herein lies the infirmity of the plaintiff's case. There is no evidence tending to show that either the plaintiff, when he offered to wait until fall

for payment of Harrington's debt, provided the defendent would give his note therefor, or that the defendant, when he made the alleged promise to pay the debt in the fall, did so with reference to the plaintiff's right to enforce a lien on the logs. It does not appear that such right was mentioned in any conversation between the plaintiff and Harrington, or between the latter and the defendant, or that it influenced the action, or was even thought of either party until after the right to a lien had expired. Moreover, the complaint alleges nothing to the contrary. It merely states that the plaintiff relied upon the promise of the defendant and allowed his right to enforce a lien to expire by lapse of time. It is not alleged that the loss of his lien was the consideration for the defendant's promise to pay Harrington's debt.

In this condition of the pleadings and evidence, it is impossible to hold that the object of, and consideration for the alleged promise of the defendant was that the plaintiff should not enforce a lien on the logs.

The oral promise is an undertaking to answer for the debt of another, and there is no proof tending to show the existence of any fact which takes it out of the statute. It is, therefore, void. The learned circuit judge should have so instructed the jury, as requested on behalf of the defendant. It was also error to submit to the jury as a question of fact, whether the defendant made the alleged promise "in order to protect his interest in the logs and to induce the plaintiff to forbear a prosecution of his claim against the logs," there being no evidence upon which to predicate the instruction.

It appears that the parties had an interview, after June 1, 1876, concerning Harrington's debt. The plaintiff testified that in that interview the defendant promised to pay the debt next fall if he had anything to pay with, but refused to give his note therefore. The defendant denied that he made such promise.

It is unnecessary to consider the effect of this testimony farther than to say that the conversation occurred after the plaintiff's right to a lien had expired by lapse of time (T. S. 1769. sec. 27), and it is not claimed that there was any other consideration for such alleged promise.

The view we have taken of the case renders it unnecessary to consider other questions raised by the exceptions and argued by the learned counsel.

The judgment of the circuit court must be reversed, and the cause remanded for a new trial.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.

October Term, 1880.

CONSTITUTIONAL LAW—RAILWAY AID BONDS.—1. This suit was upon bonds issued by the State of Louisiana in aid of the New Orleans, etc. R. Co., which are a part of the $2,500,000 represented by Williams and Guion in their case against the State, 13 Cent. L. J. 277. The questions being the same in the two cases, the judgment in this is affirmed upon the authority of that. 2. The Louisiana legislature which created a board of liquidation and authorized the funding of the State's indebtedness, had a right by subsequent act to forbid such board from receiving and funding a certain class of bonds, even if those bonds were valid. Affirmed. Appeal from the Circuit Court of the United States, for the District of Louisiana. Opinion by Mr. Justice MILLER.—*Durkee v. Board of Liquidation.*

ADMIRALTY—COLLISION—LIABILITY OF SHIP IN TOW FOR COLLISION.—A ship in tow of a tug collided with a schooner not in fault. *Held*, that both ship and tug were liable, the tug because of failure to change her course in time, and the ship because her pilot, under whose orders the tug was, neglected to give proper directions to avoid the collision after it became probable. Affirmed. Appeal from the Circuit Court of the United States for the Southern District of New York. Opinion by Mr. Chief Justice WAITE.—*Ship Civilta v. Perry; Steam Tug Restless v. Perry.*

CONVEYANCE—DESCRIPTION—BOUNDARY.—1. Where a grant refers to the western boundary of a well-known location, as shown by a chart filed with it, that description is sufficient, although the boundary may not have been actually run. 2. A mere tentative running of a line is not such a settlement of the boundary as prevents the owners from claiming beyond it, and does not authorize the State to make another grant of the tract cut off by such line. Affirmed. In error to the Circuit Court of the United States for the District of New Hampshire. Opinion by Mr. Justice BRADLEY.—*Bartlett Land Co. v. Saunders.*

ADMIRALTY—PRACTICE—CAUSES REMANDED WITH DIRECTIONS.—On motions to modify judgment and mandate. Since the decision both parties ask for additional directions with regard to further proceedings in the court below. 1. *Semble*, that sec. 636 of the Revised Statutes, providing that the circuit court may affirm, modify or reverse any judgment, decree or order of a district court, brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the district court, as the justice of the case may require, extends to admiralty proceedings, and gives the United States Circuit Court power, after hearing a cause on appeal, to remand with directions. 2. In this case proceedings on the decree of condemnation ought to be stayed pending the determination of the proceedings on the petition for limited liability. Appeals from the Circuit Court of the United States for the Eastern District of New York. Opinion by Mr. Justice BRADLEY.—*Steamship Benefactor v. Mount; New York, etc. Steamship Co. v. Mount.*

SUPREME COURT OF GEORGIA.

September, 1881.

CONVEYANCE—DEED IN ESCROW—PASSING TITLE.—1. A deed made by a trustee with the assent of the sole beneficiary, who was *sui juris*, was good; and though made to secure a debt, passed the title. (*a*) The assent of the beneficiary being on the deed, and part of it was properly recorded with it, and being in writing, is sufficient evidence of her consent to the sale. 2. A deed to secure a debt passes the legal title, and will authorize a recovery in ejectment. 3. That the holder of a deed to secure a debt under sec. 2969, etc., of the Code, recovered judgment, and made and filed a deed to the debtor for the purpose of levying on the land, did not pass the title back to the debtor. It was a mere escrow except for the putpose of levy and sale. (*a*) This was not altered by the fact that the debtor obtained the deed from the clerk's office without the knowledge of the creditor by paying recording fees therefor, and parol testimony was admissible to show such fact. 4. *Semble*, that suing to judgment the notes to secure which the deed was given, would not bar an action of ejectment on the deed; and that the pendency of an affidavit of illegality to a levy under a judgment so rendered would not be good as a plea in abatement. The proper equitable defense is to pay the debt and demand a re-conveyance. Judgment affirmed. Opinion by JACKSON, C. J.—*Dykes v. McVay.*

TITLE IN CONTROVERSY—INJUNCTION TO STAY WASTE.—The title to land being in controversy and the evidence concerning it conflicting, one of the claimants filed his bill to enjoin the other from using the pine trees on the land for the manufacture of turpentine. It appeared that this use, while injurious to the timber, did not destroy the corpus of the estate. The evidence on the question of insolvency was conflicting. The chancellor granted the injunction, but provided that it should be dissolved upon defendant's giving bond to answer any verdict for damages which complainant might recover against him. *Held*, that there was no error in granting such conditional dissolutions. Judgment affirmed. Opinion by JACKSON, C. J.—*Tift v. Hanell.*

ATTORNEY AND CLIENT — RIGHT TO HOLD MONEY BECAUSE FEE IS DUE.—1. An attorney who has collected money for a client can not hold the entire amount, and refuse to pay over the same because a small part is due him as fees. (*a*) Nor is it any defense to a rule by the administrator *de bonis non* to collect such fund, that the client of defendant was the primary administrator, and defendant was one of the securities on his bond; that defendant, having collected money for the estate, paid it over to the administrator, who returned it to him to keep, to secure him against liability on the bond. 2. Where it was shown on an application for *ne exeat* that the defendant had declared his intention of leaving the State shortly before that time, and had made application to be dismissed from the administration on a certain estate in open court, on the ground that he intended to remove from the State, an answer to the effect that the defendant had intended so to remove, but had altered his mind and did not so intend at the time of filing the answer, but might change his mind if he saw fit, was not sufficient to prevent the grant of the writ of *ne exeat*. 3. Under the facts of this case, the remedy at law was not adequate, and there was good ground for equitable interposition. Judgment reversed. Opinion by JACKSON, C. J.—*Conyers v. Gray.*

SUPREME COURT OF INDIANA.

September, 1881.

BILL OF EXCHANGE—INDORSEMENT FOR IDENTIFICATION—LIABILITY.—1. Sued as an indorser on a bill of exchange, appellant answered that he went to the bank merely to identify the payee of the bill sued on, and, at the request of the bank, wrote his name on the back of the bill for the purpose of identifying the payee; that he had no interest in the bill, did not negotiate it, or sign it as maker, surety or indorser, and that he was not informed and did not understand that he was signing as an indorser. *Held*, that the answer was insufficient. The contract was a written one, and parol evidence was not admissible to modify or contradict it. The exception to this rule is that parol evidence may be admitted to show that the indorsement created a trust, as for collection, etc. 14 Md. 320; 6 Kas. 412; 64 Ind. 220. An indorsement regularly following that of the payee, as in this case, constitutes a contract with a legal force and meaning as complete as if all the conditions were written out in full. 64 Ind. 52; 45 Ind. 411; 40 Ind. 461; 95 U. S. 474; 10 Wall. 564. 2. The general statement in the answer that appellant did not indorse the note, is a mere conclusion of the pleader, and does not make the answer sufficient. The substantive, traversable facts are to be looked to in determining the sufficiency of a pleading, and not mere conclusions. 71 Ind. 363. Affirmed. Opinion by ELLIOTT, J.—*Stack v. Beach.*

TENANCY IN COMMON — PURCHASE OF CO-TENANT'S TITLE AT A TAX SALE.—1. A tenant in common in possession or in the enjoyment of the rents and profits, can not acquire his co-tenant's title by purchasing the same at a tax sale. Such a purchase amounts only to a payment of the tax or to a redemption from the sale if the tax certificate is purchased from a stranger. 38 Ill. 342; 8 Mich. 263; 51 Pa. St. 377; 38 Vt. 465; Cooley, Tax. 345. 2. A purchased the interest of one cotenant in certain land. Afterwards the land was sold for taxes, and A took an assignment of the certificate from such purchaser, procured a deed thereon in 1873, and entered into possession of the land which he held, asserting title to the whole

thereof until the fall of 1878, when he left the State. In January, 1879, B purchased the interest of the other co-tenant in said land. When he did so, the premises were vacant, the fences partially down, the house empty and doorless, and there was no evidence of possession by any one, although when A removed from the State, he left the key of the house with his son-in-law, who lived a mile distant, and requested him to take charge and oversight of the land. *Held*, that there was not such adverse possession as to vitiate the deed to B. Affirmed. Opinion by NEWCOMB, COM.—*Bender v. Stewart.*

INDIVIDUAL LIABILITY OF CITIES AS STOCKHOLDERS IN CORPORATIONS.—This was an action to charge the city of Terre Haute for labor done in the construction of a railroad of which said city was a stockholder. It is contended that the city is not subject to the individual liability which is imposed on the individual stockholders, because the city's charter authorizes no such liability to be incurred. The act of May 4, 1869, expressly granted to the defendant the power to become a stockholder in a railroad company; and in conferring the power to acquire the rights and benefits of an ordinary stockholder, the Legislature must have intended to impose the attendant burdens. Indeed, the right conferred has no legal existence or definition apart from the duties and obligations connected therewith. 15 How., 304; 18 Ga., 65; 96 U. S., 628. The 38th section of the act for the incorporation of railroad companies is not unconstitutional. It was "matter properly connected with" the title of said act to provide for the liability of stockholders in such companies. Affirmed. Opinion by WOODS J.—*Shipley v. Terre Haute.*

QUERIES AND ANSWERS.

[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

38. A obtained a judgment in one of the Circuit Courts of Missouri in 1867, against B. B has made payments from time to time, his last in 1880. He now refuses to pay anything farther, although solvent. Sec. 3251 of the Revised Statutes of Missouri shows that limitation only begins to run in B's favor from his last payment, so the judgment is in full force, except as a lien upon B's real estate. It has never been revived. Sec. 2739 of Revised Statutes says: "Executions may issue upon a judgment at any time within ten years after the rendition of such judgment," and the Supreme Court of Missouri, in George v. Middough, 62 Mo. 550, construing sec. 2739, held, although, in that case, the judgment had been revived by *scire facias*, that an execution issued on a judgment of more than ten years' standing was a nullity. What is A's remedy and how can B be made to pay the balance of the judgment? L.

39. When a bridge is to be built, a statute requires the proper officers of the county to let it to the lowest bidder, who shall enter into bond with good sureties, payable to such officers for the prompt, proper and efficient performance of the work according to the plans and specifications. After the contract is made and the bond executed, the obligor purchases, partly on credit, lumber for the building of the bridge, and commences work. When the bridge is partly built, the obligor dies insolvent. Is it the duty of his administrator to complete the work and receive the stipulated price, or has he any such power? Are the sureties absolved by the death of the principal, or are they responsible for the completion of the contract? What is the position of a creditor from whom the obligor borrowed money to pay for part of the lumber, and to whom he assigned a part of the funds to become due for the bridge? B. & G.

Vicksburg, Miss.

40. Supposing there are eleven passenger cars and one locomotive going from a certain place, and only one conductor, three brakemen and one officer aboard the whole train of cars, which are full of passengers, and one passenger is assaulted and beaten by a gang of passengers (ruffians), can the passenger assaulted hold the company liable? On the said car where the passenger was, and was assaulted and beaten, there was no conductor or officer to protect the passenger, who called out for aid to help him, in that particular car. Not until a long while afterwards were the passengers arrested who assaulted him, and who were afterwards convicted of the crime. A. K.

New York.

41. A sends his horse to B to be fed and trained. C sues out an execution on the horse for a debt due him from A. Query: Has B a lien on the horse for either feed or training, or both? F. S., Jr.

Columbus, Ohio.

QUERIES ANSWERED.

Query 32. [13 Cent. L. J. 238.] A undertakes to sell B's horse to C, for which A is to receive a commission from B, furnishes a blank form of contract note which is executed by C, and delivered to A, C taking the horse. The note is as follows: "$100. One year from date I promise to pay B, or order, one hundred dollars, for value received in one certain horse, the title, ownership and right to the possession of which, it is hereby agreed, shall be and remain in B, until this note is paid in full; and B shall have the right to take possession of said horse at any time he may deem himself insecure, even before the maturity of this note." A, in consideration that he shall receive 10 per cent. of the money when collected, indorses said note as follows: "For value received, I hereby guarantee the payment of the within note at maturity, and the collection of the same at any time thereafter, provided the owner thereof shall have instituted suit against the maker—if to be found—within fifteen months from maturity, and waive protest, demand and notice of non-payment." After suit against C, brought within the fifteen months, and failure to collect, can B

maintain an action against A upon said guaranty, or, will the plea of no consideration to C avail A?

P.

Answer. A contracts with C for B's horse; the note taken is B's note; the horse is B's and to remain so, until payment is made by C in full, C having only possession, but not a right to possession—only at the will of B. If B should at any time within the year demand his horse of C, and C refuse to deliver it up to B, could B sue C on the note? Answer, No. But his action would be in replevin or trover for a conversion, as the title, ownership and right of possession is in B (see Tiffany on Replevin), C having no property in or right to possession of said horse, sufficient to enable him to maintain an action in replevin. Then upon C's failure to pay, according to the terms of said contract note, the horse being B's, all B can do is to gain possession of his horse by consent of C, or by due process of law. The query states that B failed to collect note of C, but don't state why; it is no doubt for the reason stated above. When A and B entered into a contract concerning said contract note, by guarantee or otherwise, B and A were only privity to that contract. B, relying upon A's guarantee, which was induced by the payment of the ten per cent. to A, which was a valuable consideration, A was liable to B for the contract price of said horse upon B's failure to collect of C. B has a contract with C, also one with A, and he may elect to rely upon either, according to the terms of the contract, upon the failure of C to pay, to take his horse, or try to collect it of C and bind A, and no plea of anything pertaining to said contract between B and C can in any way avail A, as they are separate transactions between different parties and for a different consideration.

Grand Rapids, Mich. T. H. GIRARD.

Query 30. [13 Cent. L. J. 219.] Where a married woman holds a statutory separate estate, with full power to sell and convey the same jointly with the husband, under a statute requiring her to acknowledge the deed upon a private examination separate and apart from her husband in the mode pointed out by the statute—can she appoint and constitute an attorney in fact to execute the deed for her? And if so, shall she execute the power of attorney jointly with her husband and upon a private examination as required in the execution of the deed? Then, will this dispense with the certificate of acknowledgment on a private examination to the deed?

Washington, D. C. G. E. H.

Answer No. 2. An appropriate answer to the second part of the above query is to be found in "Martindale on Conveyancing," a book yet in press, but soon to issue from the office of the Central Law Journal. Sec. 240 reads as follows: "In several of the States it is provided by statute that a married woman may convey her real estate or relinquish her dower in the real estate of her husband, by a power of attorney authorizing its conveyance, executed and acknowledged by her jointly with her husband, as deeds conveying real estate by them are required to be executed and acknowledged. (Rev. Stats. Mo. 1879, sec. 670; Rev. Stats. Ill. 1877, ch. 30. sec. 17.) In such States where the wife joins with her husband in executing a power to convey his land, she to relinquish her dower, authority to relinquish her dower should be conferred on the attorney in the body of the instrument, and the certificate of acknowledgment, where required, should show that, on a private examination, she acknowledged that she executed such power for the purpose of authorizing the attorney to relinquish her dower, instead of stating that she relinquished her dower, according to the common practice where this form of acknowledgment is in use. The propriety, if not vital importance, of following this suggestion, is apparent, when we consider that no title passes to the attorney, and that, therefore, the dower can not be released to him, but that the power can only authorize him to release it."—[EDITOR CENT. L. J.

RECENT LEGAL LITERATURE.

SICKELS' MINING LAWS AND DECISIONS. 1881. The United States Mining Laws and the Decisions of the Commissioner of the General Land Office, and the Secretary of the Interior thereunder; together with the Circular Instructions from the General Land Office, and Forms for establishing Proof of Claims; also the Decisions of the Supreme Court of the United States under the Mining Acts. By D. K. Sickels. San Francisco, 1881: A. L. Bancroft & Co.

This work is intended for the specialist of the law of mines and mining, and of course it can not be expected that it should be minutely criticised here. It consists, as indicated by its title page, of a collection of the statutes of the United States, enacted from time to time upon the subject of mines and mining, and the opinions of the Land Office officials in response to inquiries that have been made from time to time, together with a collection of forms. The mechanical execution is good.

FREEMAN ON JUDGMENTS. A Treatise on the Law of Judgments. Including all Final Determinations of the Rights of Parties in Actions or Proceedings at Law or in Equity. By A. C. Freeman, Counsellor-at-Law. Third edition, revised and greatly enlarged. San Francisco, 1881: A. L. Bancroft & Co.

The attitude of a book reviewer, or critic, is not unlike, in some respects, that of a weather prophet. His approbation ought to be the forerunner of that of the public; and if a work which he condemns is, nevertheless, successful (we use the term in its legitimate, rather than its commercial sense), he is put to shame. It is, therefore, with all the pride of fulfilled predictions, that we recall the cordial welcome which we extended to the second edition of this admirable work, some seven years ago. 1 Cent. L. J. 511. This edition is enriched with the addition of some 1200 late cases, which are in the last degree valuable for the very reason that they are late. The text has been increased about one-sixth, and some topics not considered in the former editions, have been treated. Among these are, what are final judgments in criminal prosecutions and in intervention cases; the form of judgments with respect to designating the parties and the relief granted; fraud and perjury as grounds for vacating judgments on motion; merger arising from prosecutions and convictions in criminal cases; set-off of one judgment against another; and an entire chap-

ter on the conclusiveness of judgments when questioned on *habeas corpus*.

The field is well nigh inexhaustible, but the work before us deals with it in an effective and radical manner.

FEDERAL PRACTICE. Federal Practice consisting of the Statutes of the United States, relating to the Organization, Jurisdiction, Practice and Procedure of the Federal Courts, and the Rules of said Courts, with full Notes of the Decisions relating thereto. By Wm. E. Miller, Late Chief Justice of the Supreme Court of Iowa, author of "Pleading and Practice," etc., and George W. Field, author of "A Treatise on the Law of Damages," "A Treatise on the Law of Private Corporations," etc., etc. Des Moines, 1881; Mills & Co.

This work consists of a reprint of the title "Judiciary" of the Revised Statutes of the United States with the cases cited in the notes. We have heretofore expressed our disbelief in the success of a work upon this plan [13 Cent. L. J. 220]. The one redeeming feature of that method of preparing a law book is the facility which is thereby afforded for the citation of authorities, making the completed work a sort of combined edition of the statutes and digest, the chief value of which depends upon the thoroughness with which the cases have been collated and arranged. he work in this book seems to have been done carefully and painstakingly. The omission of any table of cases is a defect.

NOTES.

——The Illinois Supreme Court has just decided that a female may be a *Master* in Chancery. Under the laws of Illinois, a Master in Chancery, in the absence of the judge, can order the issuing of the writs of *habeas corpus*, *ne exeat* and *certiorari*. If she could exercise her functions at home, the writ of *ne exeat* might prove most fatal in its results to lodges and clubs.—*Pacific Coast Law Journal.*

——Laymen who draw their own wills provide a pretty sure necessity for litigation. It is difficult for any but a mind legally trained to forecast sufficiently the contingencies which are likely to happen affecting the execution of testamentary intentions; and even if a layman rightly anticipated the contingencies that ought to be provided for, or at least not disregarded, they are likely to err in expression. Laymen rarely have the power of exact expression sufficient to enable them to draw a will that shall not involve obscurity in the application. One of the principal functions of the lawyer is to reduce every thought to clearness, and to be able to express it upon paper with clearness and precision. And one chief part of his business is in rightly appreciating the meaning of that which others have expressed accurately or inaccurately. His chief service in drawing a will is to put the testator's purpose within legal limits, in such clear and precise langnage as will not invite litigation; and the almost inevitable effect of a will drawn by a layman, even in the simplest manner, is a legal contest as to its meaning. To a layman nothing would seem simpler than a will by which the testator gives "everything I am possessed of to A for life, and appoint B his residuary legatee." The question whether in such a will real property, acquired after its execution, passed to the residuary legatee is in litigation in England, and with so much doubt that the Master of the Rolls declared it desirable that the judgment of the Court of Appeals should be taken upon it (*In re* Methuen, 71 Law Times, 129).

Under the law of this State, since the Revised Statutes, there would be little question on this point; but others equally simple give rise to litigation every day.

A well-drawn will is a work of art, and the traces of the hand of a master are plainly visible in it as in any other form of composition.

Some English barrister is supposed to be the author of the following epigram:

Testators are good, but a feeliug more tender
Springs up when I think of the feminine gender;
The testatrix for me, who, like Telemaque's mother,
Unweaves at one time what she wove at another.
She bequeaths, she repents, she recalls a donation,
And she ends by revoking her own revocation;
Still scribbling or scratching some new codicil,
Oh! success to the woman who makes her own will.—
New York Daily Register.

——The standard legal dictionaries in use may be searched in vain for more accurate definitions of legal terms than those recently given by a physician in Pulaski, Tennessee, as reported to us by a leading member of the Bar of that place. Mr. B——, and Mr. L——, opposing counsel in a pending case, were engaged in taking depositions to be used on the trial of the cause. The question as to a certain woman's soundness of mind being in dispute, a physician was called as a medical expert, and during his examination the following dialogue took place:—Do you think this lady is of sound mind? No, sir, I do not. Does she know the difference between a "power of attorney" and an "absolute conveyance?" No, sir, of course she don't, and there are very few women who do. Do you know the difference? Yes, sir, of course I do—do you suppose I am an Ignoramus? Well, sir, will you be kind enough to tell us the difference? Well, a "power of attorney" is the strength of mind of any particular lawyer; and an "absolute conveyance" is a hack or omnibus, or railroad car, or something of the sort.—*Bench and Bar.*